

# Aviation and Emissions Trading in the European Union: Pie in the Sky or Compatible with International Law?

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In 2003, the then European Community<sup>1</sup> adopted Directive 2003/87/EC, establishing a scheme for trading allowances of greenhouse gas (GHG) emissions.<sup>2</sup> Directive 2003/87/EC mandated the establishment of an emissions trading scheme (ETS) within the European Community “to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.”<sup>3</sup> The preamble to Directive 2003/87/EC states that the establishment of such a scheme would contribute to the achievement of the European Community’s and its Member States’ commitments under the Kyoto Protocol.<sup>4</sup> In this regard, the Protocol is a mechanism enacted by the United Nations Framework Convention on Climate Change<sup>5</sup> to promote reductions in emissions associated with climate change. The Protocol entered into force in 2005 and requires participating Annex 1 countries—in effect, developed

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1. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0001:0010:EN:PDF> (European Community existed as a legal entity until the Treaty of Lisbon was entered into force); see also Consolidated Version of The Treaty on European Union, May 9, 2008, 2008 O.J. (C 115) 13, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF> [hereinafter The Treaty on European Union]. The Treaty of Lisbon, inter alia, amended the Treaty on European Union. Article 1 of the [current] Treaty on European Union directs that, “The Union shall replace and succeed the European Community . . .” *Id.*

2. See Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive, 2003 O.J. (L 275), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0087:EN:HTML> [hereinafter Directive 2003/87/EC].

3. *Id.*

4. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/CP/1997/7/Add.1; 37 I.L.M. 22 (Dec. 10, 1997), available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf> [hereinafter Kyoto Protocol].

5. See generally U.N. Framework Convention on Climate Change, Mar. 24, 1994, 2303 U.N.T.S. 148, available at [http://unfccc.int/essential\\_background/convention/background/items/1349.php](http://unfccc.int/essential_background/convention/background/items/1349.php).

countries—to reduce certain GHG emissions by 2012 to at least 5 percent below 1990 levels.<sup>6</sup> The European Union pledged to reduce greenhouse gas emissions listed in Annex A of the Kyoto Protocol to 8 percent below 1990 levels in the period 2008 to 2012.<sup>7</sup>

Because of the European Union's emissions reduction pledge, the ETS is considered "a cornerstone of European policy on climate change"<sup>8</sup> and is the world's largest such scheme.<sup>9</sup> The ETS did not initially include emissions from aviation activities; however the omission of aviation activities from the ETS eventually came to an end on January 1, 2012 when Directive 2008/101/EC, which amended Directive 2003/87/EC,<sup>10</sup> entered into force.<sup>11</sup> The extension of the ETS to aviation emissions requires aviation operators to surrender emission allowances equivalent to the total number of emissions produced the preceding year, and applies penalties to operators who do not comply with this obligation.<sup>12</sup> Initially, 85 percent of emission allowances will be distributed freely with the remaining 15 percent auctioned, with a reserve fund of allowances being made available to new market entrants.<sup>13</sup>

In addition to applying to European aviation companies, the ETS also applies to flights operated by aviation companies based outside of the European Union if those flights have arrive or depart at an aerodrome in the European Union.<sup>14</sup> Critical of this aspect of the ETS, aviation operators based in countries, such as the United States, Canada, China, and Singapore argue, inter alia, that the ETS constitutes a tax on their airlines, is liable to penalize fast growing airlines, and adds significant costs to an industry already operating on small margins.<sup>15</sup>

6. See Kyoto Protocol, *supra* note 4, art. 3.

7. See Directive 2003/87/EC, *supra* note 2.

8. Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change*, Opinion of Advocate General Kokott, 2011 E.C.R. 00000 (Oct. 6, 2011), available at <http://curia.europa.eu/juris/celex.jsf?celex=62010CC0366&lang1=en&type=NOT&ancre>.

9. See Suzanne Kingston, *Current Developments: European Union Law*, 59 INT'L & COMP. L.Q. 1129, 1131 (2010), available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7923357>.

10. See *id.*; see also Directive 2003/87/EC, *supra* note 2. As a consequence of Article 1(4) of Directive 2008/101, Directive 2003/87/EC now contains a provision in Chapter II, Article 3a that states, "The provisions of this Chapter shall apply to the allocation and issue of allowances in respect of aviation activities listed in Annex I." For the date of the entry into force of the amendment, see paragraph 2 of the introduction in Annex I of Directive 2003/87 (as amended) which states, "From 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included."

11. See Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 2009 O.J. (L 8) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:008:0003:0021:en:PDF> [hereinafter Directive 2008/101/EC].

12. See *id.* at arts. 12, 16.

13. See *id.* at art. 1, ¶¶ 8–9 (amending Directive 2003/87/EC arts. 3c-e).

14. See *id.* at 17, Annex 1.

15. See Damian Kahya, *Air Wars: Fears of Trade War Over EU Airlines Carbon Cap*, BBC NEWS (Dec. 21, 2011, 7:57 AM), <http://www.bbc.co.uk/news/business-14325571>; see also Jonathan Watts,

The criticism surrounding the actions of the European Union recently resulted in a legal challenge before the Court of Justice of the European Union on the validity of the extension of the ETS to include aviation.<sup>16</sup> This challenge was brought by a number of airlines and associated organizations headquartered in the United States, including Air Transport Association of America, American Airlines, Continental Airlines, and United Airlines.<sup>17</sup> This Article will explore the legal basis for the challenge to the European Union's extension of its ETS to aviation emissions and review the Court of Justice's consideration of the implicated issues, and will conclude with an evaluation of the likely next steps in this continuing dispute.

### I. THE SUBSTANCE OF THE LEGAL CHALLENGE

The airlines and associated organizations mentioned in the above paragraph commenced a judicial review of the challenged Directive before the High Court of Justice of England and Wales (English High Court)<sup>18</sup> While the claimants challenged the measures taken by the United Kingdom to implement Directive 2008/101/EC,<sup>19</sup> the more pertinent question of the validity of the directive itself was at the heart of the action. The claimants alleged that the extension of the ETS to encompass emissions from aviation breached several international agreements as well as a number of principles of customary international law.<sup>20</sup> In this regard, the Convention on International Civil Aviation (known as the Chicago Convention), the Kyoto Protocol, and the Open Skies Agreement were claimed to have been violated on the basis, *inter alia*, that the scheme imposes a tax on fuel consumption. The claimants also alleged that the application of the ETS to operators based outside of the European Union extends outside the territorial jurisdiction of the European Union, in breach of several principles of customary international law.<sup>21</sup>

National courts of the E.U. Member States, as a general rule, do not have the power to declare an act of an E.U. institution invalid, since this task is

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*Chinese Airlines Refuse to Pay EU Carbon Tax*, THE GUARDIAN (Jan. 4, 2012, 1:18 PM), <http://www.guardian.co.uk/environment/2012/jan/04/china-airlines-eu-carbon-tax>; James Kanter, *The Battle Over Aviation Emissions*, THE NEW YORK TIMES (Dec. 18, 2011), <http://www.nytimes.com/2011/12/19/business/energy-environment/the-battle-over-aviation-emissions.html?pagewanted=all>.

16. See generally Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change*, Judgment of the Court of Justice of the European Union (Dec. 21, 2011), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=117193&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=598262>.

17. See *id.* ¶ 2.

18. See *id.*

19. See *id.* ¶¶ 2, 43; see also Directive 2008/101/EC, *supra* note 11. See generally Regulations 2010/1996 The Aviation Greenhouse Gas Emissions Trading Scheme, available at <http://www.legislation.gov.uk/uksi/2010/1996/made>; The Defendant, United Kingdom Secretary of State for Energy and Climate Change, was the department responsible for implementing the Directive. See Case C-366/10, Judgment of the Court of Justice of the European Union, ¶¶ 2, 43.

20. See Case C-366/10, Judgment of the Court of Justice of the European Union, ¶ 43.

21. See *id.* ¶¶ 108, 121.

specifically reserved to the E.U. courts.<sup>22</sup> However, matters concerning the validity and interpretation of provisions of E.U. law may arise in the context of disputes heard at the national level. Accordingly, under Article 267 of the Treaty on the Functioning of the European Union (TFEU), a national court or tribunal of an E.U. Member State may seek what is referred to as a “preliminary ruling” from the Court of Justice on the interpretation of the constituent treaties or the “validity and interpretation of acts of the institutions . . .”<sup>23</sup> In essence, under the TFEU Article 267 preliminary ruling procedure, a national court of an E.U. Member State may ask the Court of Justice to provide a ruling on a point of E.U. law. The national court will then utilize the Court of Justice’s ruling in deciding the dispute before it.

In the specific case at issue, the English High Court sought a preliminary ruling from the Court of Justice on the validity of certain aspects of Directive 2008/101/EC.<sup>24</sup> This required the Court of Justice to consider a number of questions, the first of which was whether provisions of certain international agreements can be used to assess the validity of E.U. law.<sup>25</sup> A related question asked by the English High Court was whether certain principles of customary international law could be utilized to review the validity of E.U. law.<sup>26</sup> Assuming an affirmative answer to these questions, the final task for the Court of Justice would be to consider whether the cited provisions and principles did, in fact, serve to affect the validity of Directive 2008/101/EC.<sup>27</sup>

*A. Can the Provisions of Certain International Agreements Be Used to Assess the Validity of International Law?*

The Court of Justice commenced its analysis by noting that, pursuant to TFEU Article 216(2),<sup>28</sup> international agreements negotiated by the European Union are binding on the E.U. institutions and as such, will prevail over conflicting acts of the E.U. institutions.<sup>29</sup> It therefore follows that, as a matter of law, the validity of acts of the E.U. institutions may be assessed for conformity with the provisions of international legal agreements provided that

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22. See Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost, 1987 E.C.R. 419, ¶¶ 15–19, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985CJ0314:EN:PDF>.

23. Consolidated Version of the Treaty on the Functioning of the European Union, art. 267, 2010 O.J. (C 83) 164, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

24. See Case C-366/10, Air Transp. Ass’n of America v. Sec’y of State for Energy and Climate Change, Opinion of Advocate General Kokott, ¶¶ 3–4 (Oct 6, 2011), available at <http://curia.europa.eu/juris/celex.jsf?celex=62010CC0366&lang1=en&type=NOT&ancre>.

25. See Case C-366/10, Air Transp. Ass’n of America v. Sec’y of State for Energy and Climate Change, Reference for a Preliminary Ruling From High Court of Justice Queen’s Bench Division (July 22, 2010), available at <http://curia.europa.eu/juris/document/document.jsf?docid=78971&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=598262>.

26. See *id.*

27. See *id.*

28. See The Treaty on European Union art. 216(2), *supra* note 1.

29. Case C-366/10, Air Transp. Ass’n of America v. Sec’y of State for Energy and Climate Change, Judgment of the Court of Justice of the European Union, ¶ 50 (Dec. 21, 2011).

three conditions are fulfilled. First, the European Union must be bound by the rules in question;<sup>30</sup> second, the “the nature and the broad logic” of the international agreement at issue must not preclude such an examination;<sup>31</sup> and, finally, the provisions of the international agreement in question must be “unconditional and sufficiently precise.”<sup>32</sup> This final criterion requires that the provision at issue contains a clear and precise obligation and prohibits any further measures from being taken to ensure its implementation.<sup>33</sup> Having set out these criteria, the Court of Justice analyzed the provisions of the international agreements cited in the request for a preliminary ruling and considered whether they met the delineated criteria to act as benchmarks against which the validity of the contested Directive could be judged.

### 1. *The Chicago Convention*

The European Union is not a party to the Chicago Convention,<sup>34</sup> although its Member States are signatories.<sup>35</sup> While certain matters covered by the Convention have been legislated upon by the European Union,<sup>36</sup> the Court of Justice found that the European Union does not yet have exclusive competence in all areas covered by the Convention.<sup>37</sup> As such, the European Union is not bound by the Convention, and accordingly, the provisions of the Convention cannot be used as a benchmark upon which to judge the validity of E.U. law.<sup>38</sup>

### 2. *The Kyoto Protocol*

The European Union is a party to the Kyoto Protocol, and thus Kyoto is an integral part of the legal order of the European Union.<sup>39</sup> However, the request for a preliminary ruling made specific reference to the validity of the Directive 2008/101/EC in light of Article 2(2) of the Protocol, which provides that “The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation . . . working through the International Civil Aviation Organization [ICAO].”<sup>40</sup> The

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30. *See id.* ¶ 52.

31. *See id.* ¶ 53.

32. *See id.* ¶ 54.

33. *See id.* ¶ 55.

34. *See* Convention on International Civil Aviation at the Chicago Convention, Dec. 7, 1944, 15 U.N.T.S. 295, available at [http://www.icao.int/publications/Documents/7300\\_orig.pdf](http://www.icao.int/publications/Documents/7300_orig.pdf) [hereinafter Chicago Convention].

35. *See* Case C-366/10, *Air Transp. Ass’n of America v. Sec’y of State for Energy and Climate Change*, Judgment of the Court of Justice of the European Union, ¶¶ 3, 60 (Dec. 21, 2011).

36. *See id.* at ¶ 65.

37. *See id.* at ¶ 69.

38. *See id.* at ¶¶ 71–72.

39. *See* Case C-366/10, *Air Transp. Ass’n of America v. Sec’y of State for Energy and Climate Change*, Judgment of the Court of Justice of the European Union at ¶ 73.

40. Kyoto Protocol, *supra* note 4, art. 2; *see also* Case C-366/10, *Air Transp. Ass’n of America v. Sec’y of State for Energy and Climate Change*, Reference for a Preliminary Ruling From High Court of Justice Queen’s Bench Division (July 22, 2010).

Court of Justice did not find this provision unconditional or sufficiently precise, as it merely exhorts parties to work through the ICAO to pursue reductions of emissions of certain GHGs from aviation bunker fuels.<sup>41</sup> There is thus no precise or specific individual “right” mentioned in Article 2(2) of the Protocol and, accordingly, individuals cannot rely upon it in legal proceedings to assess the validity of E.U. law.<sup>42</sup>

### 3. *Open Skies Agreement*

The European Union is a party to Open Skies,<sup>43</sup> and the Court of Justice found nothing in the “broad logic” of the Agreement to preclude it from being used as a benchmark upon which to review the validity of Directive 2008/101/EC.<sup>44</sup> The next criterion the Court of Justice considered was whether the provisions of the Agreement cited in the English High Court’s request for a preliminary ruling were sufficiently precise and unconditional.<sup>45</sup> The first provision considered by the Court of Justice was Article 7 of the Agreement. Article 7(1) of Open Skies specifically provides that:

The laws and regulations of a Party relating to the admission to or departure from its territory of aircraft in international air navigation . . . shall be applied to the aircraft utilized by the airlines of other Party, and shall be complied with by such aircraft upon entering and departing from or while within the territory of the first Party.<sup>46</sup>

The Court of Justice held that Article 7 of the Agreement “lays down a precise and specific obligation applying to aircraft utilized by the airlines of the parties to that agreement.”<sup>47</sup> Accordingly, the Court of Justice found the provision in question to be sufficiently precise and unconditional.<sup>48</sup> Consequently, airlines could rely upon this provision could as a way to gain review the validity of Directive 2008/101/EC.<sup>49</sup>

Linked to the above and underpinning the claimants’ assertions under Article 7 of Open Skies was their objection to the fact that the ETS applies “not only upon the entry of aircraft into the territory of the Member States or on their departure from that territory, but also to those parts of flights that are carried out above the high seas and the territory of third States.”<sup>50</sup> In deciding

41. See Case C-366/10, Judgment of the Court of Justice of the European Union, ¶¶ 77–78.

42. See *id.*

43. See Air Transport Agreement of April 2007 between the European Community and its Member States, of the one part, and the United States of America, of the other part, April 2007, 2007 O.J. (L 134) 4, available at <http://www.official-documents.gov.uk/document/cm81/8137/8137.asp> [hereinafter Open Skies Agreement].

44. Case C-366/10, Judgment of the Court of Justice of the European Union, ¶¶ 80–85.

45. *Id.* ¶ 85.

46. Open Skies Agreement art. 7, *supra* note 43.

47. Case C-366/10, Air Transp. Ass’n of Am. v. Sec’y of State for Energy & Climate Change, Judgment of the Court of Justice of the European Union, ¶ 86 (Dec. 21, 2011).

48. See *id.* ¶ 87.

49. See *id.*

50. *Id.* ¶ 131.

this issue, the Court of Justice held that aircraft registered in third States, and that fly over third States or over the high seas, are not subject to the ETS.<sup>51</sup> Instead, aircraft only become subject to the ETS if their operator makes the commercial decision that the flight in question departs from or arrives at an aerodrome situated in an E.U. Member State.<sup>52</sup> Accordingly, there is nothing in the text of Article 7 of the Agreement to preclude the application of the ETS to flights that originate or arrive at E.U. aerodromes, and so the Court of Justice found no breach of Article 7.<sup>53</sup>

Under the request for a preliminary ruling the Court of Justice also had to consider Article 11(1) and (2)(c) of the Agreement, which essentially provide an exemption—based on reciprocity—on charges, taxes, levies, and duties, and fees on lubricants, fuel, and consumable technical supplies for use in the aircraft of the other party.<sup>54</sup> The Court of Justice held that these provisions were capable of being relied upon to assess the validity of Directive 2008/101/EC.<sup>55</sup>

The essence of the claimants' statements in relation to Article 11(1) and (2)(c) of the Agreement was that Directive 2008/101/EC infringes the obligation of the European Union not to apply taxes and other charges on aircraft fuel.<sup>56</sup> The Court of Justice commenced its examination by noting that, unlike a tax or charge that is intended to generate revenue for public authorities,<sup>57</sup> the extension of the ETS to aviation emissions was designed to achieve an environmental objective.<sup>58</sup> This distinctive feature, combined with the market-based operation of the ETS, meant that in the view of the Court of Justice, the ETS could not be regarded as imposing a tax or charge, and therefore, there was no violation of Article 11(1) or (2)(c) of the Agreement.<sup>59</sup>

The final provisions of Open Skies considered by the Court of Justice were Articles 15(3), 2, and 3(4).<sup>60</sup> The first sentence of Article 15(3) mandates that environmental standards adopted by the ICAO be followed “except where differences have been filed.”<sup>61</sup> The second sentence of Article 15(3) provides that “The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and Article 3(4) of this Agreement.”<sup>62</sup>

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51. *See id.* ¶ 132.

52. *See id.* ¶ 133.

53. *See* Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change*, Judgment of the Court of Justice of the European Union, ¶ 135 (Dec. 21, 2011).

54. *See* Open Skies Agreement, *supra* note 43, art. 11(2)(c).

55. Case C-366/10, Judgment of the Court of Justice of the European Union, ¶ 94.

56. *See id.* ¶ 136.

57. *See id.* ¶ 143.

58. *See id.* ¶ 138.

59. *See id.* ¶ 147.

60. *See id.* ¶¶ 93–100.

61. Open Skies Agreement, *supra* note 43, art. 15(3).

62. *Id.*

The Court of Justice found that the first sentence of Article 15(3) constituted an obligation to follow ICAO environmental standards except where derogations had been filed. The content of this provision was held to be sufficiently precise and unconditional to permit it to be used as a benchmark upon which to review of the validity of Directive 2008/101/EC.<sup>63</sup> The Court of Justice found the second sentence of Article 15(3), when read together with Article 2 and 3(4) of the Agreement, to impose an obligation upon the European Union, when enacting an environmental measure taking the form of an airport charge capable of limiting the volume, regularity or frequency of transatlantic air services, to ensure that any such charge on airlines from the United States should not be higher than that payable by airlines from an E.U. Member State.<sup>64</sup> The essence of this obligation, in the view of the Court of Justice, was that the “European Union must allow a fair and equal opportunity for those two categories of airline to compete.”<sup>65</sup> This provision was found to contain a sufficiently precise and unconditional obligation to be relied upon to review the validity of Directive 2008/101/EC.

Having found that Article 15(3) of the Agreement could be used as a benchmark for reviewing the validity of Directive 2008/101/EC, the Court of Justice went on to summarize the main features of the claimants’ argument with respect to this provision:

ATA [Air Transport Association of America] and others submit in essence that application of Directive 2003/87 to airlines established in the United States infringes Article 15(3) of the Open Skies Agreement, since such an environmental measure is incompatible with the relevant ICAO standards. Furthermore, in rendering the scheme laid down by Directive 2003/87 applicable to aviation, Directive 2008/101 constitutes a measure limiting in particular the volume of traffic and frequency of service, in breach of Article 3(4) of that agreement. Finally, application of such a scheme amounts to a charge incompatible with Article 15 of the Chicago Convention, a provision which the parties to the Open Skies Agreement undertook to comply with pursuant to Article 3(4) of that agreement.<sup>66</sup>

In considering these claims, the Court of Justice noted that no evidence had been produced to justify the allegation that the extension of the ETS to include aviation violated any ICAO environmental standard within the meaning of Article 15(3) of the Agreement.<sup>67</sup> Furthermore, the Court of Justice noted that there was nothing in the text of the second sentence of Article 15(3) of the Agreement, when read in conjunction with Article 3(4) of the same Agreement, to prevent measures being taken which may reduce the frequency of a service, provided that the measures were designed to meet an environmental goal.<sup>68</sup>

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63. See Case C-366/10, Judgment of the Court of Justice of the European Union, ¶¶ 95–96.

64. See *id.* ¶ 99.

65. *Id.*

66. See *id.* ¶ 148.

67. See *id.* ¶ 149.

68. See *id.* ¶ 152.



Indeed, Article 3(4) expressly notes that limitations may not be applied “except as may be required for . . . environmental . . . reasons.”<sup>69</sup> However, what *is* required by the second sentence of Article 15(3) of the Agreement, when read together with Articles 2 and 3(4) thereof, is that any such measure be applied in a non-discriminatory manner.<sup>70</sup> The Court of Justice found this requirement to be satisfied as a consequence of the uniform application of the ETS to all airline operators that operate flights departing from or arriving at an aerodrome in an E.U. Member State.<sup>71</sup> Accordingly, none of the agreements cited by the claimants called into question the validity of the contested Directive.

*B. Can Principles of Customary International Law Be Used to Assess the Validity of E.U. Law?*

In its request for a preliminary reference, the English High Court asked the Court of Justice whether the validity of Directive 2008/101/EC could be called into question by several principles of customary international law. The request addressed four specific principles of customary international law: (1) each State may exercise complete and exclusive sovereignty over its airspace; (2) no State may subject any part of the high seas to its sovereignty; (3) freedom to fly over the high seas should not be obstructed; and finally, (4) aircraft overflying the high seas are subject to the exclusive jurisdiction of the country of registration, except as provided for by international treaty.<sup>72</sup> The defendant rejected the existence of the final principle as being a principle of customary international law.<sup>73</sup>

In approaching the question of whether the cited principles of customary law can be used to review the validity of Directive 2008/101/EC, the Court of Justice commenced its analysis by noting that pursuant to TFEU Article 3(5), the European Union must contribute to “the strict observance and the development of international law.”<sup>74</sup> The practical import of this provision is that customary international law is binding upon the institutions of the European Union.<sup>75</sup>

As such, the Court of Justice had to first establish whether the cited principles are recognized as customary international law.<sup>76</sup> The Court answered this question in the affirmative with respect to the first three principles; however, regarding the fourth principle, that aircraft flying over the high seas are subject to the exclusive jurisdiction of the country of registration, the Court

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69. *Id.* ¶ 153.

70. *Id.* ¶ 154.

71. *See id.* ¶ 155.

72. *See id.* ¶ 45.

73. *See id.* ¶ 106.

74. The Treaty on European Union, *supra* note 1, art. 3(5).

75. *See* Case C-366/10, Judgment of the Court of Justice of the European Union, ¶ 101.

76. *See id.* ¶ 102.

of Justice found insufficient evidence to establish the principle as customary international law.<sup>77</sup>

While E.U. institutions are bound to act in accordance with customary international law principles, it does not automatically follow that individuals challenging the validity of acts of the E.U. institutions may rely upon these principles. Consequently, the Court of Justice had to assess whether the three accepted principles were “capable of calling into question the competence of the E.U. institutions to adopt the act” in question.<sup>78</sup> Particularly, the Court of Justice had to address whether extension of the Directive required that it be “carried out in part over the high seas and over the third States’ territory.”<sup>79</sup>

In essence, this question pertains to the territorial scope of the ETS and the related inquiry as to whether it applies extraterritorially, so as to impinge upon the sovereignty of other states, thereby violating customary international law.<sup>80</sup> The Court of Justice noted that, given the lack of precision of principles of customary international law, the applicable standard of review is whether, in adopting Directive 2008/101/EC, the E.U. institutions made “manifest errors of assessment concerning the conditions for applying those principles.”<sup>81</sup>

The Court of Justice commenced its analysis by noting that aircraft operators will only be subject to the ETS if they have chosen to operate a route that departs from or arrives at an E.U. aerodrome.<sup>82</sup> Thus, the European Union is entitled to apply the ETS to such aircraft on the basis of the territorial principle of jurisdiction, and accordingly, there can be no impingement upon the sovereignty of other states or breach of customary international law.<sup>83</sup> Given that there is no violation of customary international law, the application of the ETS “to all flights which arrive at or depart from an aerodrome situated in the territory of a Member State” cannot be called into question on the grounds that the E.U. institutions lacked competence to enact such legislation.<sup>84</sup> Accordingly, the Court of Justice “concluded that examination of Directive 2008/101 has disclosed no factor of such a kind as to affect its validity.”<sup>85</sup> Accordingly, neither the international agreements nor the principles of customary international law cited in the application for judicial review before the English High Court called into question the validity of the contested Directive.

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77. *See id.* ¶ 106.

78. *Id.* ¶ 107.

79. *Id.* ¶ 108.

80. *See id.* ¶ 121.

81. *Id.* ¶ 110.

82. *See id.* ¶ 127.

83. *See id.* ¶¶ 124–25.

84. *See id.* ¶ 130.

85. *Id.* ¶ 157.

## II. LOOKING FORWARD

Given the findings of the Court of Justice, the U.S. airline industry will likely consider alternative legal routes to challenge the extension of the ETS to include aviation emissions.<sup>86</sup> The present action before the English High Court is an “indirect” challenge to the terms of the aviation scheme. A “direct” challenge to the legality of E.U. legislation is permissible pursuant to TFEU Article 263, which provides that, “The Court of Justice of the European Union shall review the legality of legislative acts . . .”<sup>87</sup> The rules for standing under this provision, however, are extremely restrictive for natural and legal persons.<sup>88</sup> In the type of action at issue, the parties will generally have to show “direct and individual” concern in the measure in order to satisfy the standing requirement.<sup>89</sup> The other criterion upon which a natural or legal person may establish *locus standi* under Article 263 (4) TFEU is where the act in question is, “a regulatory act which is of direct concern to them and does not entail implementing measures.”<sup>90</sup> The requirement of individual concern is particularly troublesome for applicants who must demonstrate that an act of the E.U. institutions “affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually.”<sup>91</sup> With such strict requirements, it is unlikely that even E.U. based applicants would be assessed to have attributes “peculiar to them.” This was undoubtedly their rationale to pursue an “indirect challenge” via national courts.<sup>92</sup>

Another alternative legal avenue to challenge the ETS’ inclusion of aviation emissions would be for the United States to initiate a dispute before the ICAO Council under Article 84 of the Chicago Convention.<sup>93</sup> While the dispute settlement facility of the ICAO has been seldom used, there is precedent for such an action, as the United States previously brought a

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86. Kanter, *supra* note 15.

87. The Treaty on European Union, *supra* note 1, art. 263.

88. *See id.*

89. *Id.*

90. *Id.*

91. Case 25/62, *Plaumann & Co. v. Comm’n on the European Econ. Cmty.*, Judgment of the Court, 1963 E.C.R. 95 (July 15, 1963), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0025:EN:HTML>.

92. *See* Steven Truxel, *At the Sidelines of Implementing the EU ETS: Objections to “Validity”* 16(4) INT’L TRADE L. & REG. 111, 115–18 (2010).

93. *See* Chicago Convention, *supra* note 34, art. 84 (“If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council”).

complaint before the ICAO Council regarding a European regulation on aircraft noise.<sup>94</sup>

In the meantime, political events may overtake the judicial process. The U.S. House of Representatives recently passed the European Union Emissions Trading Scheme Prohibition Act of 2011, to “prohibit operators of civil aircraft of the United States from participating in the European Union’s emissions trading scheme . . . .”<sup>95</sup> While the U.S. Senate has not yet passed this bill, commentators have warned that any “blocking statute” could provoke a transatlantic trade war.<sup>96</sup> In a similar regard, the deputy secretary general of China’s leading civil aviation organization has also stated that the airlines represented by his organization will not cooperate with the ETS, marking a burgeoning dispute between the European Union and aviation bodies from around the world.<sup>97</sup>

The European Union has taken great pains to highlight that it considers the extension of its ETS to include aviation emissions an important and necessary element of the region’s efforts to curb the threat of climate change.<sup>98</sup> The E.U. Commissioner for Climate Change, in response to the judgment of the Court of Justice discussed in this Article, stated that, “We reaffirm our wish to engage constructively with everyone during the implementation of our legislation.”<sup>99</sup> The first charges associated with the ETS are not set to be levied until the summer of 2013. Only time will tell if the parties involved use the remaining time for “constructive” engagement.

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94. See generally Sean D. Murphy, *Admissibility of U.S.-EU "Hushkits" Dispute Before the ICAO*, 95 AM. J. INT’L L. 410 (2001).

95. H.R. 2594, 112th Cong. (1st Sess. 2011), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h112-2594>.

96. See *US Bill Complicates EU Aviation Emissions Initiative*, INT’L CENTRE FOR TRADE AND SUSTAINABLE DEV. (OCT. 31, 2011), <http://ictsd.org/i/news/biores/117262/>. See generally ECKHARD PACHE, FED. MINISTRY FOR THE ENV’T, NATURE CONSERVATION AND NUCLEAR SAFETY, ON THE COMPATIBILITY WITH INTERNATIONAL LEGAL PROVISIONS OF INCLUDING GREENHOUSE GAS EMISSIONS FROM INTERNATIONAL AVIATION IN THE EU EMISSION ALLOWANCE TRADING SCHEME AS A RESULT OF THE PROPOSED CHANGES TO THE EU EMISSION ALLOWANCE TRADING DIRECTIVE (2008), available at [http://www.bmu.de/files/pdfs/allgemein/application/pdf/aviation\\_emission\\_trading.pdf](http://www.bmu.de/files/pdfs/allgemein/application/pdf/aviation_emission_trading.pdf).

97. See Watts, *supra* note 15.

98. See Kahya, *supra* note 15.

99. *Statement of the Commissioner for Climate Change on the Case 366/10* (Dec. 21, 2011), available at [http://ec.europa.eu/commission\\_2010-2014/hedegaard/headlines/news/2011-12-21\\_01\\_en.htm](http://ec.europa.eu/commission_2010-2014/hedegaard/headlines/news/2011-12-21_01_en.htm).